

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

816

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,733

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM D. HENDERSON,

Appellant

On Appeal from the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 5 1970

Nathan J. Anderson
CLERK

LEE M. MODJESKA
Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006

Counsel for Appellant
(Appointed by this Court)

INDEX

	<u>Page</u>
Statement of Issues	
References to Rulings	1
Statement of the Case	2
The Course of the Proceedings	2
The Facts	3
A. The First Trial	3
B. The Second Trial	4
Argument	20
I. Government Counsel's Statements to the Jury Concerning Appellant's Possession of a Gun and the Former Co-Defendant's Possession of a Luggage Tag Constituted Prejudicial Error.	20
II. The District Court Erred in Declaring the First Trial a Mistrial, and Retrial of Appellant Violated the Double Jeopardy Clause of the Fifth Amendment.	22
III. The District Court Erred in Permitting the Government to Impeach Appellant's Testimony by Showing a Prior Conviction.	25
IV. The Evidence of Value Was Inadequate to Support the Grand Larceny Conviction.	27
V. There Was Insufficient Evidence From Which the Jury Could Find Appellant's Guilt Without a Reasonable Doubt.	30
Conclusion	33
Constitutional and Statutory Provisions Involved	34

CITATIONS

	<u>Page</u>
Allen v. United States, Nos. 22,179, 22,180 (D.C. Cir., Nov. 19, 1969)	31
Burnet v. Houston, 283 U.S. 223, 51 S.Ct. 413	29
* Carsey v. United States, 129 U.S. App. D.C. 205, 392 F.2d 810 (1967)	23, 24
* Cofflin v. Maryland, 230 Md. 139, 186 A.2d 216	29
Crawford v. United States, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967)	31
Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947)	31
* Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963)	24
* Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967)	25, 26
Henry v. United States, 49 U.S. App. D.C. 207, 263 F. 459 (1919)	27
* Johnson v. United States, 124 U.S. App. D.C. 29, 360 F.2d 844 (1966)	31
* Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)	25
* Mercer v. Maryland, 237 Md. 479, 206 A.2d 797 (1965)	30
Owens v. United States, 115 U.S. App. D.C. 233, 318 F.2d 204 (1963)	28
Ransom v. United States, 119 U.S. App. D.C. 154, 337 F.2d 550 (1964)	27
Saah v. Mussolino, D.C. Mun. App. 144 A.2d 541 (1958)	29
* United States v. Coleman, No. 22,316 (D.C. Cir., July 11, 1969)	25, 26
* United States v. McCord, No. 22,308 (D.C. Cir., Dec. 1, 1969)	25
* Cases or authorities chiefly relied upon are marked by asterisks.	

STATEMENT OF ISSUES

I. Whether Government counsel's statements to the jury concerning appellant's possession of a gun and the former co-defendant's possession of a luggage tag constituted prejudicial error.

II. Whether the District Court erred in declaring the first trial a mistrial, and whether retrial of appellant violated the Double Jeopardy clause of the Fifth Amendment.

III. Whether the District Court erred in permitting the Government to impeach appellant's testimony by showing a prior conviction.

IV. Whether the evidence of value was inadequate to support the grand larceny conviction.

V. Whether there was insufficient evidence from which the jury could find appellant's guilt without a reasonable doubt.

This case has not previously been before this Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,733

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM D. HENDERSON,

Appellant

On Appeal from the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

REFERENCES TO RULINGS

The District Court on May 15, 1969 issued a Statement of Reasons Pursuant to Federal Rules of Appellate Procedure 9(a) for declaring the first trial a mistrial; that opinion is set forth at page 11 of the Duplicate Transcript of Pleadings filed with this Court.

STATEMENT OF THE CASE

The Course of the Proceedings

This case is before the Court upon the appeal of William Donald Henderson from his conviction in the United States District Court for the District of Columbia of the offenses of Second Degree Burglary, 22 D.C. Code sec. 1801(b), and Grand Larceny, 22 D.C. Code sec. 2201. Appellant was indicted by the Grand Jury on August 19, 1968 (presentment on September 13, 1968)(Pl. 1, 3). ^{1/} Appellant's first trial on the foregoing counts commenced on May 12, 1969, before Judge Luther W. Youngdahl, and was declared a mistrial on May 14 (1-Tr. 210, Pl. 11). ^{2/} The second trial was held before Judge William B. Jones in June 1969 and resulted in the convictions. On November 7, 1969, the District Court sentenced appellant to serve from two to nine years on each offense, the sentences to run concurrently (Pl. 28). The Notice of Appeal was filed on November 7, 1969 (Pl. 26).

1/ "Pl." refers to the "Duplicate Transcript of Pleadings, Etc." filed with this Court on December 4, 1969.

2/ "1-Tr." and "2-Tr." refer to the Transcripts of Testimony at the first and second trials, respectively.

The first count of the indictment charged that on June 4, 1968 appellant and Lawrence C. Bromley^{3/} entered the dwelling of Marilou Fromme with intent to steal property of another (Pl. 1). The second count charged that on June 4, 1968 appellant and Bromley stole the following property (total value \$204.92) of Marilou Fromme: suitcase (value \$37.50), camera (value \$15.00); radio (value \$30.00), shaver (value \$17.00); binoculars (value \$10.00); record player (value \$40.00); two records (value \$10.00); clock (value \$15.00); clothing (value \$25.00); and coins (value \$5.42) (Pl. 1).

The Facts

A. The First Trial

On May 13, 1969, during the third day of the first trial and as the case was drawing to a close, and after the defense had rested its case, the Assistant United States Attorney stated in open court in the presence of the jury, "We will call one last witness, the defendant Henderson's mother. She's seated right outside" (1-Tr. 205, 207). The record then reflects "THE DEFENDANT HENDERSON'S MOTHER NOT AVAILABLE FOR TESTIMONY" (1-Tr. 207). The jury was taken out and the Court reprimanded Government counsel both for calling appellant's mother as a witness and for making

^{3/} Appellant and Bromley were tried jointly at the first trial. Bromley was not tried at the second trial.

the announcement before the jury without being certain she would appear (1-Tr. 207-210). According to the Statement of Reasons^{4/} defense counsel neither made any objection nor moved for a mistrial, and the Court sua sponte raised the question of whether the Government's conduct did not require a mistrial (Pl. 11, p. 1). The Court stated to counsel that the announcement was "most prejudicial" and "in my opinion, has no chance of standing before the Court of Appeals" (1-Tr. 210). Appellant's counsel then moved for a mistrial and the Court granted the motion for a mistrial as to appellant (1-Tr. 210).^{5/}

After declaring the mistrial the Court questioned appellant concerning the incident (1-Tr. 212-213). Appellant at first denied talking to his mother and then, upon probing, stated that "I told her not to answer any of his [the Assistant United States Attorney] questions" (1-Tr. 213). The Court then ordered appellant committed without bail pending further trial (1-Tr. 213, Pl. 11, p. 2).

B. The Second Trial

The relevant testimony adduced at the second trial may be summarized briefly as follows:

^{4/} Statement of Reasons Pursuant to Federal Rules of Appellate Procedure 9(a), filed by the Court on May 15, 1969 (Pl. 11).

^{5/} The Government did not call appellant's mother as a witness at the second trial.

Mr. Hugh Howard, a witness for the Government, testified that he was the resident manager of an apartment building consisting of four floors with seventy-three apartments located at 2325 - 42nd Street, N.W., in the District of Columbia (2-Tr. 32-33, 54-56), and that Marilou Fromme was a tenant of Apartment 208 in that building (2-Tr. 46). Howard testified that shortly before 4:00 p.m., on June 4, 1968 he was riding down the building elevator with a plumber who was doing work in the building and that as the elevator approached the first floor he heard the incinerator door close (2-Tr. 33-34).^{6/} The incinerator door was located about three to five feet from the elevator door on the first floor (2-Tr. 34-35, 59-60). Howard testified that when he got off the elevator he saw two young white boys, nineteen or twenty, between the incinerator door and a door leading from the hallway to a staircase, a distance of about three feet, and that the boys were walking away from the elevator and incinerator door areas towards the staircase door (2-Tr. 35-37, 59-61, 64-69). Howard said he glimpsed the boys for a few seconds, that he saw their faces from the side, that he could not remember how they were dressed, and that one was heavier than the other (2-Tr. 36-37, 50-52, 59-61).^{7/} Howard testified

6/ The plumber was not called as a witness by the Government.

7/ Howard testified that he did not pay any attention to the color of their shirts, nor to their shoes, nor to their hair, nor to whether or not either had a moustache or sideburns (2-Tr. 50-51). Howard stated "I didn't pay no attention to their personal appearances" and, regarding the "heavy-set one" brought out of another building later, "I didn't notice what his personal appearance was" (2-Tr. 51).

that he went to the incinerator, looked inside the incinerator doors and saw two objects on the floor in the space between the doors and the chute, that the objects looked like a suitcase and "a typewriter or something of some kind or other," and that the boys were out of his vision during this time (2-Tr. 37, 60-61, 71).

Howard testified that he then walked down the hallway in the opposite direction and around a corner, and that he then turned around and came back and saw someone peeping out of the staircase door (2-Tr. 37-38, 61-64, 65). Howard said that the two boys came out, that he asked them if they were looking for someone in the building, that they "gave me the name of some girl on the third floor," and that he told them no one by that name lived there (2-Tr. 38, 54, 61, 64, 67). Howard testified that the boys then went to the steps of the lobby, that he spoke to his employee, Austin Gainus about them, that he (Howard) then went and made a phone call to the police and when he returned from making the call there was no one in the lobby (2-Tr. 38-42, 64-65, 67-69). Howard testified that he went outside, spoke to a tenant named Mrs. Sanchez, saw the heavier boy standing at a corner fifty or more feet away, the police car then came down the street, Howard ran to his car and the boy ran into a parking lot by another apartment building in the next block (2-Tr. 42-45, 56-58, 69). Howard testified that he saw "Henderson" later, from the passenger window of his car, in police

custody being brought out of the other apartment building and that Henderson was one of the two men he had seen in his own apartment building (2-Tr. 45-46, 49, 51-53). Howard testified that he could not make any identification in the courtroom of either of the two men (2-Tr. 49, 51-52).^{3/}

Howard testified that he later showed police officers to the incinerator and that the officers found the same two objects he had seen earlier (2 Tr. 47-49). Howard testified that he did not himself look to see exactly what the objects were (2-Tr. 49).

Mr. Arthur Gainus, a witness for the Government, testified that he was employed as a clean-up man at the apartment building at 2325 - 42nd Street, N.W. (2-Tr. 72-73). Gainus testified that on June 4, 1968, in the afternoon, Mr. Hugh Howard told him to watch two men standing in the hallway of the building by the front door (2-Tr. 73). Gainus testified that the two men left the building, walked to the corner and turned and walked over to the next block (41st Street), crossed the street and came back to 42nd Street, and when the police came, ran into the entrance of a building further down on 42nd Street (2-Tr. 74-77). Gainus testified that he was unable to make any identification in the courtroom and further that "It's been so long, and I never approached them -- I guess from

8/ Howard stated that, "Well, I am not able to actually identify him. Now, by its being so long since it happened, I couldn't really say that I could really identify him" (2-Tr. 49), and "Now, it's been over a year now. I couldn't say that I recollect him now" (2-Tr. 51-52).

between two directions. And I couldn't see if there was any -- I didn't need to get too close because I knew what they had and I didn't want them to know like I was watching them real close so they started to get away from me. So I didn't get a good look" (2-Tr. 77).

Mrs. Vivian Sanchez, a witness for the Government, testified that she lived at the apartment building at 2325 - 42nd Street, N.W., (Tr. 78). Sanchez testified that on June 4, 1968, between 3 p.m. and 4 p.m. she came into the lobby of the apartment building with several children with whom she was babysitting (2-Tr. 78, 92).^{9/}

Sanchez testified that she saw two young white men, ages nineteen to twenty-one, standing at the top step in the lobby, and that she stood there beside them on the step, about two to three feet from them and close enough to have touched them, for five minutes just staring at them (2-Tr. 79-81, 86-88). Sanchez stated that the children just stood there waiting for her to take them outside (2-Tr. 88).^{10/}

Sanchez identified appellant in the courtroom as having been one of the two men (2-Tr. 88).^{11/} She testified that both men wore

^{9/} The record here does not establish the age or identity of the children. The record of the first trial reflects their ages as two or two and one-half (1-Tr. 71).

^{10/} At the first trial Sanchez testified that she came into the lobby saw two men on the step in the lobby, that they looked at her and she looked at them, and that she went outside and stood outside on the steps for five to ten minutes looking through the glass door at them on the inside (1-Tr. 65, 71, 74-75).

^{11/} Appellant had a moustache at the time of trial (2-Tr. 210).

casual clothes, and that the "dark-headed guy" [her reference to appellant, 2-Tr. 80-81] had on "some kind of a sweat shirt and some dark pants," no moustache, no glasses, a slight beard, that his hair was longer than at the trial, and that she could not remember the color of his shirt or whether or not he had long sideburns (2-Tr. 81, 90-91).^{12/}

Sanchez testified that after standing inside for five minutes staring at the two men she then went outside the building onto the front steps, and from there she continued to stand and stare at them on the inside for another five minutes (2-Tr. 81, 88, 92). She said they eventually came out of the building and walked off to the left around the side of the building onto Beecher Street and disappeared out of her sight (2-Tr. 82, 95-96). Sanchez testified that several minutes later "three of them" reappeared on the opposite side of 42nd Street and that she continued to stare at them because Howard and Gainus had instructed her to do so (2-Tr. 82-83, 91-97). When asked to describe them, Sanchez testified "Well, the two of them and another guy. Just a guy," and "Oh, I can't describe them. I wasn't interested in them. Just three of them come wandering down the other side of the street" (2-Tr. 91).

^{12/} At the first trial Sanchez testified that appellant was wearing casual clothes, that she remembered nothing more specific about his clothing, that he had no moustache and no beard, and that he did have long sideburns (1-Tr. 75).

Sanchez testified that the three men wandered around on the opposite side of the street for "five or ten or fifteen" minutes looking towards the windows and looking towards the apartment as if undecided about where to go (2-Tr. 83).^{13/} Sanchez testified that when the police sirens came the men ran into an apartment building on the opposite side and further down on 42nd Street (2-Tr. 83-85, 97-100). Sanchez testified that she saw the police bring two boys out of the building, but that she could not identify or determine who it was, stating that there were a lot of people around and "I could just see an object with the policeman" (2-Tr. 85, 98-100).^{14/}

Police Officer Kenneth W. Libby, a witness for the Government, testified that he was assigned as a detective at Number Seven Precinct on June 4, 1968 (2-Tr. 105-106). Libby testified that Officer Dallas Canham had appellant in custody at the station house, and that Canham laid some property on the counter next to the booking officer (2-Tr. 107). Libby said he saw three coins among this property which "appeared to be items which a normal, average, everyday person wouldn't be carrying with them" and so he seized them as evidence (2-Tr. 107, G.X. 3).^{15/} Libby testified that the three coins so separated were a quarter, a silver penny, and a bronze foreign coin (2-Tr. 109, 114-116, 118-119). Libby also testified

^{13/} At the first trial Sanchez testified that the men were gone for about five minutes (1-Tr. 65).

^{14/} At the first trial Sanchez testified, "I saw the police bring somebody out but I wasn't close enough to identify them but still standing in front of my building looking towards the building as the police brought them out" (1-Tr. 67).

^{15/} "G.X." refers to Government Exhibits at the second trial.

that Canham turned in nine quarters, nine dimes, twenty-nine nickels, and eighty-three pennies (2-Tr. 112-113, G.X. 4). Libby testified that later that evening he saw former co-defendant Bromley's car in the rear of the parking lot at the station, and that he understood it had been towed there by use of a crane (2-Tr. 126-128).

Miss Marilou Fromme, a witness for the Government, testified that she lived in apartment 208 at 2325 - 42nd Street, N.W. (2-Tr. 129). Fromme testified that on June 4, 1968 she was away from her apartment from about 2:15 p.m. to 5:15 p.m., and that upon her return she identified a suitcase and a record player in police possession as hers and as missing from her apartment (2-Tr. 130-134). She testified that later that evening at the Seventh Precinct Station she identified the contents of the suitcase as hers and as missing from her apartment (2-Tr. 133-135). Fromme testified as follows concerning the various items:^{16/}

Suitcase (G.X. 1). Fromme testified that she had purchased the suitcase, American Tourister brand, the week prior to June 8 for \$37.50 (2-Tr. 131-132, 163).

Record Player (G.X. 2). Fromme testified that the record player had been a gift about two and one-half years earlier, that she had been pricing record players at the time of the gift, and that its price then was about \$40.00 (2-Tr. 136, 162).

Records (G.X. 2). Fromme testified that two records left on the record player were a gift, she did not state when the gift was made, and she estimated their cost at \$10.00 (2-Tr. 134-136, 163).

^{16/} No receipts or similar evidence regarding value or purchase were introduced.

Transistor Radio (G.X. 5). Fromme testified that she had purchased the transistor radio, a ten-transistor Zenith, at Dalmo's Appliance Center a year earlier, and that she estimated its cost at \$30.00 (2-Tr. 136-137, 143-144, 156-160, 162).

Electric Shaver and Case (G.X. 6-A, 6-B). Fromme testified that she had purchased the electric Remington shaver and case a week earlier, and she estimated its cost at \$17.00 (2-Tr. 138-139, 144-145, 163).

Camera (G.X. 7). Fromme testified that the camera, a Kodak Brownie, had been a gift four or five years earlier, and that she estimated its selling price at about \$15.00 (2-Tr. 140-141, 145, 163).

Travel Alarm Clock (G.X. 8). Fromme testified that she had purchased the travel alarm clock, a Seth Thomas, a year or a year and one-half earlier, and that she estimated its cost at \$15.00 (2-Tr. 145-146, 163).^{17/}

Clothing. Fromme testified that the suitcase also contained some women's lingerie, a purse, several paperback books, and several screwdrivers, and that she estimated the cost of the women's undergarments at \$25.00 (2-Tr. 146-148, 153). She neither detailed the items nor gave their time of purchase.

Fromme testified that she had left a number of coins in a coffee can in her bedroom bureau drawer and that these coins were

^{17/} Binoculars, recited in the indictment (Pl. 1), were not mentioned at the trial.

gone when she returned to her apartment the afternoon of June 4 (2-Tr. 149-150, 164-169). She testified that there had been an indeterminate number of dimes and quarters in her collection (2-Tr. 166-167), and that there had been at least three rolls of pennies (fifty pennies per roll) plus some loose pennies (2-Tr. 165-166). She testified that on the evening of June 3 she had counted twenty-nine nickels in her collection (2-Tr. 150). Fromme also testified that her collection contained a 1936 quarter, a silver-colored 1943 American steel penny, and a Canadian Centennial penny, and that these three coins were similar to those shown her on Government Exhibit 3 (2-Tr. 151-153). Fromme also testified that about four months earlier, in February 1968, her entire coin collection had been stolen from her apartment (2-Tr. 167-169, 172-173).^{18/}

Police officer Donald E. Canham, Jr., a witness for the Government, testified that on June 4, 1968 at about 3:55 p.m., he responded in his scout car, with siren running, to a call at 2325 - 42nd Street, N.W., and that upon arriving there Hugh Howard directed his attention to an apartment building at 2215 - 42nd Street, N.W. (2-Tr. 179-182, 200, 202). He stated that Police Officer J.W. Danner had at that time also responded to the call (2-Tr. 182). Canham testified that he entered the 2215 building and found appellant in the laundry room in the basement crouched between a washing machine and a wall (2-Tr. 182-158, 201-202). Canham stated

^{18/} Appellant's trial counsel's motion for a directed verdict on the grand larceny count on the ground that the projected speculative figures failed to establish the requisite value was denied (2-Tr. 215).

that appellant was heavier than at time of trial, that he was clean shaven, that his sideburns were about the same as at time of trial, that he needed a haircut, that he had on regular street or sport clothes, and that he did not have on a sweat shirt (2-Tr. 196-197, 200-201).^{19/} Canham testified that Danner apprehended Lawrence Charles Bromley, appellant's cousin, at the 2215 building (2-Tr. 187-188). Canham testified that there was no back entrance or exit to the 2215 building, that the police took two men from the building, and that to the best of his knowledge no third person was ever taken out (2-Tr. 198-199).

Canham testified that he searched appellant and recovered a large amount of assorted coins from appellant's right-front pants pocket, that he kept the coins on his person until arriving at the Seventh Precinct about ten minutes later, and that he and Detective Kenneth Libby then made an inventory of the coins (2-Tr. 184-186, 202). Canham testified that Libby placed some of the coins on a three-by-five card, that he had taken these particular coins from appellant, that Libby typed the various amounts of all the coins on the property envelope, and that the entries corresponded accurately with the amount of coins which Canham had removed from appellant (2-Tr. 186-187). Canham testified that neither appellant nor Bromley had any rolls of pennies or change on their person (2-Tr. 198).

^{19/} Canham testified that he had known appellant for seven or eight years and that they had gone to junior high school together (2-Tr. 179).

Canham testified that after the arrest he returned to the 2325 building and at Hugh Howard's direction went to the incinerator where he found a suitcase and record player, and that later at the Seventh Precinct he examined the contents in the presence of Miss Marilou Fromme who identified the items as hers (2-Tr. 188-194). Canham testified that these various items and Fromme's apartment were dusted for fingerprints, but that no identifiable prints were recovered (2-Tr. 194-195, 199, 203-205). Canham testified that appellant was not wearing gloves when arrested, that he had no gloves on his person, and that a search failed to reveal any gloves in the area (2-Tr. 197-198). Canham also testified that appellant had no tools of any kind on his person (2-Tr. 198). Canham testified that he heard something about a car being towed away from the area (2-Tr. 199-200).

Police Officer Joseph W. Danner, a witness for the Government, testified that on June 4, 1968, shortly before 4:00 p.m. he responded in his scout car to a call at 2325 - 42nd Street, N.W., with siren running, and that as he entered the area he saw two subjects from about forty or fifty feet away running towards the building at 2215 42nd Street, N.W. (2-Tr. 206-210). Danner testified that he spoke with someone and about ten minutes after arriving on the scene he entered the 2215 building (2-Tr. 210). Danner testified that Canham had appellant in custody in the basement, that Danner then searched the rest of the building and upon going through a trap door into the attic found Lawrence Bromley lying under a window shelter at the rear of the attic (2-Tr. 211-212).

William Daniel Bromley, a witness for the defense, testified that he lived at 2614 - 39th Street, N.W., a few blocks from 2325 - 42nd Street, N.W., and that on the afternoon of June 4, 1968, he received a phone call from his brother-in-law and that as a result he was expecting a visit from Lawrence Bromley and appellant (2-Tr. 217-220, 224). Bromley stated that Lawrence Bromley was his brother and appellant his cousin (2-Tr. 221). Bromley testified that the call came from his mother's house at 3938 T Street, N.W., where both Lawrence Bromley and appellant were located at the time (2-Tr. 219-232). Bromley testified that they never arrived and that later that day he went to the Number Seven Precinct to get Lawrence Bromley's car (2-Tr. 220). Bromley testified that the car was "a piece of junk" and that he had considerable trouble trying to start and drive it (2-Tr. 221).^{20/}

Appellant testified that on the afternoon of June 4, 1968, after Lawrence Bromley telephoned his brother, William Bromley, appellant and Lawrence Bromley started out to drive to William Bromley's home (2-Tr. 238-239, 247). Appellant testified that the car broke down en route and that he and Lawrence Bromley pushed the car to the curb by the apartment building at 2325 - 42nd Street, N.W. (2-Tr. 239, 250-251). Appellant testified that he and Bromley

^{20/} Bromley testified that "the car is really a piece of junk. I had to work on the carburetor to make it start. Then when it started the transmission had a zinging noise and I pushed it back down again. And then I had to get out, start it up again, and I finally got up the hill" (2-Tr. 221).

went into the building looking for a pay telephone to call Teddie Bromley, William's wife, but that after a conversation with Mr. Howard they found that no telephone was available in the building (2-Tr. 239-240, 251, 256-257). Appellant specifically denied entering Miss Fromme's apartment or taking any property from that apartment or any other place in the area (2-Tr. 237-238). Appellant testified that he and Bromley encountered Howard by the lobby steps, that they were not near the incinerator and did not in fact know where the incinerator was, that they were not close to the elevator and did not go into or peep out of any stairway door (2-Tr. 239, 251-258). Appellant testified that he did not see Miss Sanchez in the lobby, that she did not stand on the lobby steps with them, but that he did see someone standing out in front of the building (2-Tr. 257-258). Appellant admitted to Government counsel that Bromley picked up something which looked like a key chain from the lobby steps as they left the building (2-Tr. 264-265, 258-263).^{21/}

^{21/} At the first trial Police Officer Danner testified that he found in Bromley's pocket an American Tourister tag, red, white and blue in color, with no name on it, and that Miss Fromme had identified the tag as similar to one which she had (2-Tr. 85-87). At the first trial Miss Fromme testified that the tag was similar to one which had been on her suitcase (2-Tr. 139-140). Also at the first trial appellant testified that Bromley had picked up a key chain on the lobby steps (1-Tr. 197-198). At the second trial during his opening statements to the jury, Government counsel stated that the police would testify that they had found the tag on Bromley and that Miss Fromme would testify that the tag was identical to that which had been on her suitcase (Transcript, Opening Statements of Government Counsel, June 4, 1969, pp. 5-6). During the course of the second trial the trial court excluded all testimony regarding the tag (2-Tr. 154-156, 212, 213, 259). Government counsel thereafter raised the tag issue on the purported ground of attempting to impeach appellant's testimony regarding the length of time he and Bromley were in the lobby (2-Tr. 258-265).

Appellant testified that he and Bromley then left the building to continue looking for a pay telephone, and that when he heard the police cars coming he ran and hid in the building where he was subsequently found by the police (2-Tr. 241, 256-257, 265-270). Appellant testified that he ran and hid because he had previously been arrested at the nearby police precinct, was out on bond on a pending charge, and that he was afraid of becoming involved in any trouble (2-Tr. 241-268, 270, 341). Appellant stated: "I knew I was arrested a half a block away from the precinct, and I wasn't supposed to get into any more trouble. I ran and hid. * * * I said I was scared. There was no special trouble. I was scared when I seen the police coming, and I ran and hid" (2-Tr. 269). Appellant admitted that he had been carrying a gun which he threw into the bushes just before running into the building, that it would not have helped him to have been arrested and found with a gun in his possession, and that "I was scared mainly because I was on bond and the police were coming" (2-Tr. 343-344).^{22/} Appellant testified, in response to Government counsel's

^{22/} At the first trial appellant testified that he found the gun by his home earlier that afternoon, that he had it with him later, and that he threw it into the bushes when he ran into the building (1-Tr. 185-187, 191-194, 198-200). At the first trial Police Officer Canham testified that he found the gun, a .32 caliber automatic pistol, in the bushes in front of 2315 - 42nd Street, N.W. (1-Tr. 79-80). At the first trial appellant testified: "Just before we got to the building the police was coming down the street and coming pretty fast and I knew I shouldn't have the gun. I was scared and threw it into the bushes and went in the building. * * * I was scared; I knew -- well, people don't throw guns away. It could have been used in a murder or holdup. I knew I had no business with it."

questioning, that he had been on bond for embezzlement, and that he had recently pleaded and been found guilty of that offense.^{23/}

Appellant testified that before leaving his house on June 4 he asked his aunt for money, she gave him permission to take some from a table, and he then took four or five dollars in change in quarters, nickels, dimes and pennies from the top of a dresser (2-Tr. 240, 246-247). Appellant testified, "My aunt keeps money laying around the house all over" (2-Tr. 246). Appellant testified that he intended to convert the change into paper money but never had the chance (2-Tr. 247).

Police Officer Joseph W. Danner, recalled as a witness for the Government, testified that on June 4, 1968 an outside pay telephone was located at the northwest corner of the 2325 - 42nd Street,

I was scared and ran into the building. * * * I hoped if the police seen us throw the gun or seen me throw the gun, I hoped that they wouldn't come and look behind that washing machine because I knew I had no business with the gun" (1-Tr. 198, 199, 200). At the second trial during his opening statements to the jury, Government counsel stated that it would be shown that the police found a .32 caliber automatic pistol at the entrance to the building where they found appellant, that appellant's fingerprints were on the pistol, and that five or six bullets were found on Bromley's person (Transcript, Opening Statements of Government Counsel, June 4, 1969, pp. 7-8). Thereafter and during the initial moments of the trial, the trial court excluded all testimony regarding the gun (2-Tr. 27, 30, 22-32). Government counsel subsequently raised the gun issue on the purported ground of attempting to impeach appellant's testimony regarding the reasons why appellant ran (2-Tr. 270-271, 334-342).

^{23/} The record states that appellant was sentenced upon a plea of guilty in an embezzlement case the month preceding the second trial (2-Tr. 3, 236).

N.W. apartment building adjacent to the parking lot (2-Tr. 351-256). Danner testified that he never walked up to the booth and never lifted up the phone (2-Tr. 256).

ARGUMENT

I. Government Counsel's Statements to the Jury Concerning Appellant's Possession of a Gun and the Former Co-Defendant's Possession of a Luggage Tag Constituted Prejudicial Error.

During his opening statements to the jury, Government counsel stated that it would be shown that the police found a .32 caliber automatic pistol at the entrance to the building where they found appellant, that appellant's fingerprints were on the pistol, and that five or six bullets were found on Bromley's person. The request of appellant's counsel for a mistrial at the outset of the trial was denied (2-Tr. 26-27). Thereafter and still during the initial moments of the trial the District Court excluded all testimony regarding the gun, and simply instructed the jury to "forget" Government counsel's statements (2-Tr. 27, 30, 32, 22-32). The gun was in all respects irrelevant to the issues at trial, and references to the gun were so blatantly prejudicial that a mistrial should have been granted. This is particularly so because the District Court failed to give any strong and explicit instruction to disregard the gun. Indeed, in discussing mistrial versus a "very strong instruction" the District Court stated that, "I don't think it would be strong enough for a new jury to disregard the United States Attorney's opening statement, voir dire informa-

tion, both having presented to the jury information about this gun" (2-Tr. 26).

Prejudice was compounded when Government counsel subsequently raised the gun issue on the purported ground of attempting to impeach appellant's testimony regarding the reasons why appellant ran when the police came. Appellant had testified that he ran because he was scared, because he had previously been arrested at the nearby police precinct, because he was out on bond on a pending charge, and because he was afraid of becoming involved in any trouble. Government counsel introduced the gun issue on the ground that this testimony was contrary to appellant's testimony at the first trial that he ran because he had a gun in his possession. Possession of the weapon was simply one of several reasons why appellant was scared, and why he ran, and there was no such inconsistency established to justify raising so prejudicial a matter as the gun.

Equally prejudicial were Government counsel's opening statements to the jury that the police would testify that they had found on Bromley's person a red, white and blue name tag with chain attached, and that Miss Fromme would testify that the tag was identical to that which had been on her suitcase. Such evidence as to former co-defendant Bromley, as with the gun, was totally irrelevant to the issues at trial, and reference to the tag was blatantly prejudicial. While during the course of the trial the District Court excluded all evidence regarding the tag (2-Tr. 154-156, 212-

213, 259), it made no instruction to the jury to disregard Government counsel's remarks and the tag issue. The matter was further aggravated when Government counsel subsequently raised the tag issue on the purported ground of attempting to impeach appellant's testimony regarding the length of time he and Bromley were in the lobby. Appellant had testified that he and Bromley left the lobby after their conversation with Howard (2-Tr. 258). Government counsel contended this testimony was contrary to appellant's testimony at the first trial that Bromley had picked up a key chain from the lobby steps. The purported inconsistency was specious and nonexistent, particularly in view of the slight time lapse involved in picking up an object. Government counsel's straining was improper, and the resultant effect was prejudicial.

II. The District Court Erred in Declaring
the First Trial a Mistrial, and Retrial
of Appellant Violated the Double Jeopardy
Clause of the Fifth Amendment.

At the end of the first trial, after the defense had rested, Government counsel announced before the jury that it was calling appellant's mother as a witness. (1-Tr. 205, 207) Appellant's mother was not available to testify, however, and after reprimanding Government counsel the Court declared a mistrial. (1-Tr. 207-210).

The Court criticized Government counsel both for calling appellant's mother as a witness and for making the announcement before the jury without being certain she would appear. The Court criticized Government counsel for having "committed a very

serious situation for the Court," for having created a "delicate and unusual situation," for having raised "a serious implication to this jury," and for having engaged in conduct that was "most prejudicial" (1-Tr. 207, 209, 210). The Court also stated (1-Tr. 208):

"It's a delicate situation whether you should have called her or not, very delicate, even to win a lawsuit. It's a very delicate situation of a mother getting on the stand and testifying against her son. Assuming it was in good propriety to do so, assuming that the first time that you had the opportunity to know that she was going to have some evidence that she was going to be favorable to your side of the case, knowing how many times this situation can change between mother and son, you should not have announced in front of the jury in loud tones which you did, that you were calling the mother of the defendant without being sure that she was in the witness room and was available for being called. The very result of what happened indicates it's wrong procedure in a situation like that."

On balance, the Government should not be permitted to profit by such misconduct by depriving appellant of the determination of his first trial and further by subjecting appellant to a second trial. Especially is this so where as here there is no substantial justification for the Government's actions. Indeed, the Government did not call appellant's mother as a witness at the second trial. The tactic utilized by Government counsel was grossly improper. It is a type of tactic which encouraged could result in substantial misuse and injustice. "The prosecutor should certainly not benefit from prejudice which he himself has created." (Carsey v. United States, 129 U.S. App. D.C. 205, 207, 392 F.2d 810, 812 (1967)).

Moreover, perhaps alternatively, retrial of appellant for the same crimes contravened the Double Jeopardy Clause of the Fifth

Amendment. ^{24/}

"In Downum v. United States, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963), the Supreme Court said: 'At times the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest -- when there is an imperious necessity to do so.' (Emphasis added.)" Carsey v. United States, 129 U.S. App. D.C. 205, 206, 392 F.2d 810, 811 (1967). While the situation here may well have been difficult and delicate, there was not "imperious necessity" for a mistrial. The matter could have been handled by a careful explanation and cautionary instruction. While the incident was still minor the Court could have explained to the jury that the entire incident was a mistake and that it was to be completely disregarded. While not the ultimate solution, this would have been more desirable, on balance, than depriving appellant of his first trial and subjecting him to a second trial. Again, critical to the analysis is the fact that the Government, not appellant, created the situation.

^{24/}Appellant did not consent to termination of the first trial nor did he "waive" his double jeopardy claim. Appellant's counsel did not make objection or move for a mistrial when Government counsel made the announcement. The Court raised the issue of mistrial sua sponte, and only after the Court's vigorous criticism of Government counsel and various statements concerning the impossibility of proceeding further did appellant's counsel tender a motion for a mistrial.

III. The District Court Erred in Permitting
the Government to Impeach Appellant's
Testimony by Showing a Prior Conviction.

Appellant was convicted of embezzlement, upon a plea of guilty, in the month preceding the second trial. The question of the admissibility of the conviction was raised at the start of the trial at which time the District Court summarily ruled, over objection of appellant's counsel, that the conviction was admissible under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) (2-Tr. 3-4). Government counsel was thereafter permitted, when appellant took the stand, to attempt to impeach appellant's testimony by raising and inquiring into the conviction. The District Court abused and/or failed to exercise its discretion by not excluding the conviction.

As recently stated in United States v. McCord, No. 22,308 (D.C. Cir., December 1, 1969) at 2:

Under Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) and Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), "[t]he defendant with a criminal record may ask the court to weigh the probative value of his convictions against the degree of prejudice which revelation of his past crimes would cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to hear about the prior conviction in relation to his credibility."

And as further defined in United States v. Coleman, No. 22,316 (D.C. Cir., July 11, 1969) at 4-5:

In Gordon, we held that "as a rule of thumb" convictions evidencing dishonest conduct go to testimonial credibility while those involving assaultive or violent conduct do not * * *. Gordon also emphasized other considerations highly relevant to an adjudication on impeachment by prior convictions * * *. One such consideration is the remoteness, in point of time, of a conviction, another is its similarity to the offense for which the accused is on trial. Still another is the importance, in the search for truth, of giving the triers of fact the benefit of the accused's testimony.

Assuming that embezzlement is among those "convictions which rest on dishonest conduct [and] relate to credibility" (Gordon, supra, 127 U.S. App. D.C. at 347, 383 F.2d at 940), the fact that the conviction occurred only a few weeks before the trial coupled with its similarity to the offense with which appellant was charged made the risk of prejudice to appellant so great, indeed inescapable, that the conviction should have been excluded.^{25/} This is particularly true where as here credibility and unexplained actions were so much factors, and where appellant's testimony was crucial to explain such things as running when the police came, hiding in the basement of the apartment building, and possession of the coins. Here, as in Coleman, supra at 5, "appellant's version of the affair, unembarrassed by mention of his previous difficulties with the law, could very well have been crucial." The District Court should have weighed

^{25/} Gordon, supra, 127 U.S. App. D.C. at 347, 383 F.2d at 940, notes that "A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial."

these competing factors, and should have excluded the conviction.^{26/}

IV. The Evidence of Value Was Inadequate to Support the Grand Larceny Conviction.

Appellant's counsel moved for a directed verdict on the grand larceny count because of failure of the Government to establish the requisite value of \$100 or upward (2-Tr. 215). The District Court erred in denying that motion. The quantum and mode of proof presented by the Government to establish the value of the stolen goods were insufficient to support the grand larceny conviction. "[T]he evidence of value of the articles involved in the charge of grand larceny is inadequate to sustain the finding of the jury that they were of the value of \$100 or upward. For this reason the grand larceny conviction must be reversed * * * " (Ransom v. United States, 119 U.S. App. D.C. 154, 155, 337 F.2d 550, 551 (1964)).^{27/}

^{26/} While appellant on direct examination brought out the fact that he was on bond on another charge (2-Tr. 241), this was after the District Court had ruled the conviction admissible (2-Tr. 3-4) and had specifically told appellant as he took the stand that Government counsel "will be permitted to ask you about the embezzlement" (2-Tr. 236).

^{27/} "The value of the property converted is a material element of the offense charged [embezzlement], and it must not only be alleged, but, like all other statutory elements defining the crime, it must be proved by competent evidence to the satisfaction of the jury beyond a reasonable doubt." Henry v. United States, 49 U.S. App. D.C. 207, 209, 263 F. 459, 461 (1919).

Miss Fromme's testimony as to the value of the goods may be summarized as follows:

<u>Item</u>	<u>Purchase or Gift</u>	<u>Age</u>	<u>Estimated Cost</u>
Suitcase	Purchase	1 week old	\$ 37.50
Record Player	Gift	2-1/2 years old	40.00
Records	Gift	Unknown	10.00
Transistor Radio	Purchase	1 year old	30.00
Electric Shaver & Case	Purchase	1 year old	17.00
Camera (Kodak Brownie)	Gift	4-5 years old	15.00
Travel Alarm Clock	Purchase	1 - 1-1/2 years old	15.00
Unspecified Lingerie, Purse, Screwdriver, Paperback Books	Purchase	Unknown	25.00
Coins	Both	Unknown	<u>5.70</u>
		TOTAL	\$195.20

The value of the goods stolen was established solely upon the basis of Miss Fromme's testimony, over the objection of appellant's counsel. Compare Owens v. United States, 115 U.S. App D.C. 233, 234, 318 F.2d 204, 205 (1963). No receipts or similar evidence regarding value or purchase were introduced. No merchant's testimony or affidavits, catalogs, price lists, advertisements, etc.

were introduced.^{28/} Nor was any explanation given for failure to present such evidence.

While "an owner of personal property in common use may express an opinion as to its value without qualification as an expert" nevertheless "if it is demonstrated that the owner possesses no knowledge whatever of the market price and condition of the article in question, his testimony may be inadmissible." Cofflin v. Maryland, 230 Md. 139, 186 A.2d 216, 218-219; see cases and authorities there

cited.^{29/} Miss Fromme did not purchase all of the items, many of the items were gifts. Miss Fromme did not state where many of the items were purchased. Many of the items were several years old, one about five years old. "Neither can the presumption be indulged that the cost of respondent's interest in 1906 was the value in 1913, for non constat that such cost was the value even in 1906" Burnet v. Houston, 283 U.S. 223, 228, 51 S.Ct. 413, 415, 75 L.Ed.

^{28/} "In case of ordinary personal property, where market value is sought, of course the most obvious resort is to evidence of what other similar property, whether wheat, shoes, horses, or what not, currently sold for on the market at that place." McCormick, Handbook on the Law of Damages, (1935 ed.) §46, p. 177.

^{29/} Compare Saah v. Mussolino, D.C. Mun. App., 144 A.2d 541, 542-543 (1958): "[T]he owner of the items converted, though not himself an expert, may estimate the value of his own property because of his familiarity with its quality and condition, and lack of general knowledge affects only the weight, not the admissibility, of his testimony."

991, 994-995 (1931)).^{30/} Miss Fromme did not even describe, particularize or detail some of the items, for example, she simply stated that her suitcase contained "lingerie" costing about \$25.00. Miss Fromme conceded that the values given by her were just estimates.

The evidence embodied in Miss Fromme's testimony, founded as it is here essentially upon guesswork and speculation, forms an insufficient basis upon which to convict a man of grand larceny and sentence him to nine years imprisonment.^{31/}

V. There Was Insufficient Evidence From Which the Jury Could Find Appellant's Guilt Without a Reasonable Doubt.

The relevant facts upon which appellant's conviction rests are essentially that he had been in the lobby of the building housing the burglarized apartment, that he ran and hid in a nearby building when police cars raced into the area, and that he had in

^{30/} See Mercer v. Maryland, 237 Md. 479, 206 A.2d 797,801 (1965): "The only evidence offered by the State, as to the value of the stolen [TV] set, was that of its owner, Mrs. Spooner, who testified that the set had been purchased for \$172 in 1960. * * * The article here in question had been purchased some three and one-half years before the theft and needed repairs at the time it was stolen. The value put upon it by its owner was admittedly not based on market value and, in view of the circumstances, was of itself not sufficient to sustain the burden of proof imposed upon the State."

^{31/} "In short, where there is a market value, the knowledge of the witness must be of this market value * * *." 3 Wigmore on Evidence, (3d ed. 1940) §717, p. 50.

his possession coins, some of which were similar in number and kind to coins illegally stolen from a collection, specifically, twenty-nine nickels, a 1936 quarter, a silver-colored 1943 American steel penny, and a Canadian Centennial penny.^{32/} Appellant contends (see Johnson v. United States, 124 U.S. App. D.C. 29, 360 F.2d 844, 845 (1966) (concurring opinion of Judge Burger)) that this was insufficient evidence from which the jury could find appellant's guilt without a reasonable doubt. Cf. Allen v. United States, Nos. 22,179, 22180 (D.C. Cir. November 19, 1969) at 2-4, Crawford v. United States, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967); Curley v. United States, 81 U.S. App. D.C. 389, 392, 394-395, 160 F.2d 229, 232, 234-235, cert. denied, 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947).

Appellant stresses that neither Howard nor Gainus identified appellant as having been in the burglarized apartment, particularly in the incinerator area. Miss Sanchez made conflicting and unreliable identifications and descriptions of appellant, which at most, identified appellant as having been in the lobby, a fact which appellant himself conceded. Appellant further stresses that no identification placed him at the incinerator, and that Howard's testimony is discredited by the Government's failure to call as a witness the plumber

^{32/} Also found in appellant's possession, although not tied in specifically to the collection by number and kind, were nine quarters, nine dimes, and eighty-three pennies.

who was accompanying Howard when Howard allegedly heard the incinerator door close. Appellant points to his own testimony that he received the coins from his aunt. Appellant contends that his explanation for being in the area, namely that the car broke down and he and Bromley were looking for a pay telephone, is corroborated by the evidence that the police had to tow the car to the station, and that William Bromley had considerable mechanical difficulty starting and attempting to drive the car later that evening at the station. The explanation is further corroborated by the testimony of William Bromley that he had earlier received a call from, and was expecting, appellant and Lawrence Bromley. Appellant also contends that Police Officer Canham's testimony and description of the items found on appellant's person are suspect because of Canham's past relationship with appellant. ^{33/}

^{33/} Canham testified that he had known appellant for seven or eight years and that they had gone to junior high school together (2-Tr. 179).

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed.

Respectfully submitted,

LEE M. MODJESKA
Federal Bar Building West
1819 H Street, N.W.
Washington, D.C. 20006

Attorney for Appellant
(Appointed by this Court)

CERTIFICATE

Copies of this brief have been served upon the United States Attorney, United States Courthouse, Washington, D.C. 20001.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

22 D.C. Code sec. 1801 - Burglary

(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than five years nor more than thirty years.

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canal-boat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years.

22 D.C. Code sec.2201 - Grand Larceny

Whoever shall feloniously take and carry away anything of value of the amount or value of \$100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.